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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE,

Plaintiff and Respondent,

v.

CECIL ANTHONY POWELL,

Defendant and Appellant.

C063029

(Super. Ct. No. 080802)

After hosting a party at his house, defendant Cecil Anthony Powell was under the influence of alcohol when he attempted to drive several partygoers home, and two of his teenaged passengers were killed when he crashed the car. Defendant ultimately pled guilty to two counts of gross vehicular manslaughter while intoxicated and one count of driving with a blood-alcohol content of 0.08 percent or greater and causing injury, as to which he also admitted he proximately caused bodily injury to more than one victim and personally caused great bodily injury on a nonaccomplice. The court sentenced defendant to a prison term of 14 years 8 months.

On appeal, defendant contends the court's order that he pay \$1,300 in public defender fees must be reversed because the trial court failed to follow the statutory procedures required before such an order may be imposed. The People correctly concede the error, but urge us to remand the matter for further proceedings.

DISCUSSION

“‘[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.’ [Citations.]” (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72; see *People v. Flores* (2003) 30 Cal.4th 1059, 1062-1063.)

Penal Code¹ section 987.8, subdivision (b), states “the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost” of legal assistance provided through “the public defender or private counsel appointed by the court.” Upon determining that the defendant does have “the present ability to pay all or a part of the cost” of legal assistance, “the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county” (§ 987.8, subd. (e).)

“‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include,

¹ All further statutory references are to the Penal Code.

but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (§ 987.8, subd. (g)(2).)

Thus, the statutory scheme establishes "a presumption . . . that a defendant sentenced to prison does *not* have the ability to reimburse defense costs." (*People v. Flores, supra*, 30 Cal.4th at p. 1068, italics added.)

Generally, a finding of a present ability to pay need not be express; it may be implied through the content and conduct of the hearings. (*People v. Phillips, supra*, 25 Cal.App.4th at pp. 71-72.)

Here, when defense counsel objected to the imposition of a public defender fee because defendant "has no employment and no expectations of employment" the judge responded: "You don't

think that [defendant] will have any income available while he's incarcerated. I don't know that. I mean, there's work and other resources available, and at this point, I will order the reimbursement, \$1,300."

Under the statute, however, the trial court should have begun its analysis with a presumption that defendant's prison sentence would render him unable to pay the public defender fee. Thereafter, to rebut that statutory presumption, the court was required to make a finding of an unusual circumstance. (§ 987.8, subd. (g).) It did not.

Moreover, an order to pay public defender fees cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 351.)

Not only did the trial court fail to make the requisite finding, the record does not support an implied finding of unusual circumstances. The presentence report indicated that defendant, a 20-year-old high school dropout at the time of these events, had "limited" employment experience at the time of the accident, in which he suffered serious head and eye injuries. Nothing in the record indicated he was working at the time of his arrest, had any significant work history, or had any lawful source of income. Because there was no evidence of unusual circumstances to rebut the presumption that defendant lacked the financial ability to pay for the cost of an attorney, the order requiring him to do so cannot stand.

We also conclude that here, as in *People v. Kozden* (1974) 36 Cal.App.3d 918, 920, "there is no substantial evidence to

support the trial court's determination that [defendant] possessed the *present ability* to pay the sum assessed" Nor is this an appropriate case to remand to the trial court. This is not a case such as *People v. Flores, supra*, 30 Cal.4th at page 1059, in which "a showing of unusual circumstances was conceivable because, according to the probation report, defendant possessed \$1,500 worth of jewelry at the time of sentencing." (*Id.* at p. 1068.)

In the absence of any "unusual circumstances," the presumption of section 987.8, subdivision (g)(2)(B), controls. Defendant's imprisonment also eliminates the "likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing," except for the employment opportunities that prison offers. (§ 987.8, subd. (g)(2)(C).) Accordingly, in light of defendant's circumstances, the statutory presumption in section 987.8, subdivision (g)(2)(B), and the exchange at sentencing regarding defendant's lack of ability to pay, we reject the need for a further judicial proceeding. The court having erred, we will strike the order assessing attorney fees.

The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was required to register as a sex offender, committed for a serious or violent felony, and/or had a prior conviction(s) for a serious or violent felony. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The order directing defendant to pay \$1,300 in attorney fees pursuant to section 987.8 is stricken. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.